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No. 03-33

In The Supreme Court of the United States

GAYLA MONTGOMERY, KRONNA BYRD, JOANNE PARKER and KACCI MICHAELS,

Petitioners,

v.

CLAYTON HOMES, INC. and CMH PARKS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

In addition to the parties listed by Petitioner, other parties who should be identified are CMH Capital, Inc. Corp. and Clayton Homes, Inc. CMH Parks, Inc. Corp. is a wholly-owned subsidiary of CMH Capital, Inc. Corp., which is a wholly-owned subsidiary of Clayton Homes, Inc. As of July 30, 2003, Clayton Homes, Inc. became a wholly-owned subsidiary of Berkshire Hathaway, Inc., which is not a publicly traded company.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Clayton Homes, Inc. and CMH Parks, Inc. (collectively "Respondents"), respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners, Gayla Montgomery, Kronna Byrd, Joanne Parker and Kacci Michaels.

INTRODUCTION

Despite Petitioners' best efforts to transform this case into one which warrants this Court's attention, this case involves no novel legal issues, no unresolved issues of federal law which are determinative, and no issue which is important to federal jurisprudence. Therefore, the Court should deny the Petition for Writ of Certiorari.

In the courts below and before this Court, Petitioners have mischaracterized the evidence in the record and have made conclusory assertions which are not supported in the record. That occurrence lies at the very heart of the reason for denying the Petition. That is, although Petitioners attempt to package this case as one in which important legal principles are implicated, it is not. Rather, this is nothing more than a case in which Petitioners, when given the opportunity to identify specific facts and events to support their claims of discrimination and when facing the obligation to do so in response to a motion for summary judgment, wholly failed in that regard. In addition to failing to offer specific facts to support claims of discrimination, Petitioners failed to offer evidence of when events occurred. Consequently, the trial court was unable to even determine whether the claims fell within the applicable

statute of limitations. As a result of those failures, the trial court, in accordance with the universally recognized summary judgment standard and a standard which is unchallenged in this case, dismissed Petitioners' claims. The action and rationale of the trial court was affirmed on appeal.

Indeed, the lower courts did not dismiss Petitioners' claims and affirm dismissal, respectively, by applying any principle of law inconsistent with other circuits, nor did they reach those results by applying any novel theory of law or one which is important to federal jurisprudence. Instead their rulings were quite simply the result of Petitioners' failure to present evidence (versus unsubstantiated subjective opinions) in support of their claims. That failure notwithstanding, Petitioners steadfastly persist in making conclusory assertions of discrimination and are now trying to get this Court to provide them relief despite their own failings below. Accordingly, this case presents no legal issue which warrants consideration by this Court. For this and all the reasons set out below, Respondents respectfully urge the Court to deny the writ.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in the Courts Below

Petitioners generally state the course of the proceedings and disposition in the courts below; however, some additional information regarding the holdings below is necessary. In the district court, Petitioners asserted causes of action under the Equal Pay Act; claims under Title VII for unequal pay, sexual harassment, race discrimination,

sex discrimination and retaliation; and state law claims for intentional infliction of emotional distress. Respondents filed a Motion for Summary Judgment asserting numerous grounds for dismissal of all claims of each Petitioner. Among the grounds asserted were that Petitioners failed to state a *prima facie* case, or otherwise establish the requisite elements of their claims, and that Petitioners' claims were barred by the applicable statutes of limitations. The district court found Respondents' arguments meritorious and dismissed all of Petitioners' claims. The district court found, *inter alia*, that Petitioners failed to provide any evidence to support a *prima facie* showing of the requisite elements of their claims, and it also found that Petitioners failed to establish that they had timely asserted their claims under the applicable 300-day limitations period under Title VII and the two-year limitations period under the EPA.

Thereafter, on appeal, the Fifth Circuit affirmed the district court's order. The Fifth Circuit affirmed in three layers. First, the panel noted that the district court properly identified the applicable statutes of limitations and properly applied those statutes. The Court further explained that, because Petitioners failed to establish when events had occurred or that events had occurred within the applicable limitations periods, the district court had properly rejected those claims. Second, the panel noted that, even assuming some of Petitioners' claims were timely, the Petitioners had failed to establish any *prima facie* case of discrimination. Third, the panel explained that, even if Petitioners had established any *prima facie* case of discrimination, Respondents had offered legitimate, non-discriminatory reasons for any pay disparities, and those reasons were not controverted by Petitioners.

II. Statement of Facts

The purpose of this portion of the Response is to establish Respondents' disagreement with many assertions made by Petitioners and to preserve Respondents' right to address those factual record disputes in the event this Petition is granted. It was noted by the district court in its order that Petitioners made statements which are not properly supported by the summary judgment evidence. The district court stated, "As with many of the assertions in Plaintiff's [sic] Response, this allegation is, for the most part, conclusory and unsupported by any cites to summary judgment proof." (Petition Appendix at 20a; see also Petition Appendix at 12a). The Fifth Circuit also noted that Petitioners had made conclusory assertions without record support. (Petition Appendix at 7a). Petitioners have made these same conclusory, unsupported assertions in their Petition to this Court.

Particularly, Petitioners continue to argue that they provided evidence to support their unequal pay claims under the EPA. Petitioners contend they presented evidence of "men doing the same job being paid more." (Petition at 9). What this contention wholly ignores is that the summary judgment record is devoid of evidence that Petitioners were paid less for performing the same jobs. The district court correctly provided, "Plaintiffs have failed to present evidence that the work they performed required equal skill, effort, and responsibility as the work performed by the complained of male employees." (Petition Appendix at 28a). Additionally, the Fifth Circuit panel stated, "After reviewing the record, we are persuaded that the unequal pay was the result of differences in job responsibilities, experience, and work performance." (Petition

Appendix at 4a). Likewise, in footnote 4, the panel opinion states:

> The Plaintiffs did not put forth evidence showing that the positions entailed equal work, skills and responsibilities. Their conclusory assertions that the responsibilities were identical to those of the men in question does not change this result.

(Petition Appendix at 7a). Accordingly, to the extent Petitioners' Petition asserts these issues as factually established, such assertion is not accurate. Instead, all Petitioners have done is repeat unsubstantiated assertions of a factual dispute.

In addition to making conclusory assertions not contained in the record, Petitioners inaccurately characterize evidence that is in the record. The factual inaccuracies advanced by Petitioners are significant in number and degree. Without revisiting and repeating the entire summary judgment record, Respondent does offer the following examples to illustrate the nature of the inaccurate statements made by Respondents.

First, in support of their claim that they established unequal pay between men and women, Petitioners point to David Cahill as an individual who was paid more than one of the Petitioners (Michaels) for the same work. (Petition at 10). A critical fact that Petitioners fail to point out or acknowledge is that, although Cahill assumed the job responsibilities of Petitioner Michaels as property manager during a leave of absence she took and after she left the company, Cahill was not just a property manager. Instead, he was a Special Projects Manager who, in the absence of the property manager, performed property management duties in addition to the duties of the Special

Projects Manager. Thus, quite simply, he was not a proper comparator for purposes of Petitioners' equal pay claims. The record is replete with instances like this of Petitioners attempting to compare themselves to individuals who held different jobs, had different responsibilities and different skills and experience.

A second example also relates to Petitioners' equal pay claims. Petitioners contend that they refuted any nondiscriminatory reason proffered by Respondents for pay to women that was different than pay to men by showing that Respondent generally discriminated. As evidence of this alleged systemic discrimination, Petitioners offered averages, calculated by them, which purported to show that it took women much longer to become community managers than it took men. (See Petition at 12). In advancing these averages and as pointed out in the proceedings in the lower courts, Petitioners present the information in a misleading manner. For instance, among the women included in their average is a woman who, when she first came to work for Respondent, was a housekeeper and did not have a high school diploma. It is no surprise that it took her quite a while to work her way up to the position of manager, versus the length of time it took a male employee who, when he came to work for Respondent, had a college degree and many years of experience as a manager. Petitioners' averages take no account of these types of substantial differences in qualifications and background.

In addition to these averages being misleading, the numbers used to calculate the averages are absolutely wrong in many instances. For example, in calculating their average, Petitioners, without any citation to the record, indicated that it took Sharren Giles 39 months to

become a community manager. Using deposition testimony from Sharren Giles and employment records, Respondents established that when Giles was hired, she was hired as a community manager. Thus, where Petitioners use a figure of 39 months to arrive at their average, they should have used 0. The summary judgment evidence record clearly showed that Giles was not the only woman for whom Petitioners used erroneous, inflated numbers. Again, it was errors and omissions of this sort which soundly supported the conclusion of the district court that Petitioners failed to offer summary judgment evidence to support their discrimination claims.

REASONS FOR DENYING THE WRIT

I. Opinion below is unpublished and not precedential

Initially, the Court should note that the panel opinion in this case is unpublished and not precedential. As evidenced by the Fifth Circuit's decision not to publish this decision, the decision by the Fifth Circuit is not an important legal decision in federal jurisprudence. In particular, the Fifth Circuit's analysis primarily involves the application of the particular summary judgment evidence to the established standard for a plaintiff's *prima facie* case under Title VII and the Equal Pay Act. The opinion below makes no new legal determinations or standards and, thus, is not worthy of review by this Court.

II. There is no conflict among the circuits on any legal issue presented in this case

The Fifth Circuit adheres to the rule that, in order for a claimant to present a *prima facie* case of retaliation under Title VII, she must prove that she suffered an ultimate employment action. Petitioners contend that, even if they were not subjected to an ultimate employment action, the conduct they were subjected to was so egregious, that the Fifth Circuit rule should be changed to permit a retaliation claim to proceed even in the absence of an ultimate employment action. (Petition at 15). One argument advanced by Petitioners to support their position on this point is that the Fifth Circuit is out of step with most other circuits which, according to Petitioners, do not require an ultimate employment action before a claimant can maintain a retaliation claim. Using this argument, Petitioners attempt to transform this case into one which presents a conflict among the circuits, and Petitioners contend this Court should take this case to resolve this conflict. In fact, no such legal issue is presented in this case because this case does not implicate a rule of law about which there is conflict among the circuits.

First, Petitioners overstate the alleged conflict among the circuits on this issue. To the extent other circuits are in disagreement over the "ultimate employment decision" issue, the definitions and tests provided are sufficiently similar such that, for purposes of this case, there is no appreciable difference in the tests employed by the Fifth Circuit and other circuit courts.

For instance, in the First Circuit, in order to maintain a retaliation claim, a claimant must demonstrate a "material

change" in the conditions of employment, as opposed to an "ultimate employment action." A material change has been identified as including things such as "demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of harassment by other employees." *Gu v. Boston Police Dep't*, 312 F.3d 6, 14 (1st Cir. 2002). Similarly, in the Second Circuit, a material adverse change in the terms and conditions of employment is required for a retaliation claim. *Preda v. Nissho Iwai Am. Corp.*, 128 F.3d 789, 791 (2d Cir. 1997). The Third Circuit has stated that an adverse employment action for purposes of establishing a retaliation claim is one which is "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." *Cardenas v. Massey*, 269 F.3d 251, 263 (3d Cir. 2001). Under the test as applied in the Third Circuit, harassment, intense scrutiny and overly-critical supervision have been determined to be actions which are insufficient to support a retaliation claim. *Buffa v. N.J. State Dep't of Judiciary*, 56 Fed. Appx. 571 (2003). In sum, under the facts of the present case, applying the standards employed by the Courts of Appeals in other circuits would lead to the very same result reached here.

Additionally and alternatively, even assuming there is some significant difference in the standards applied by the different circuits regarding the type of employment action necessary to support a retaliation claim, that distinction would not be determinative here or lead to a different result. It would not be determinative here because all of the circuits require a causal connection between the reporting of the violation and the adverse employment action, and that causal connection is not satisfied here.

Petitioners brought their claim complaining, in part, about alleged disparities in pay between them and men. Petitioners contend, again without any support in the record, that Respondents acknowledged the differences in pay but told Petitioners that the disparities would be corrected only if Petitioners dropped their claims. Petitioners contend this refusal constituted retaliation. Even assuming what Petitioners allege is true, which Respondents hotly dispute, that decision was not retaliatory. Rather, Respondents were merely choosing to, during the pendency of the lawsuit, refrain from changing previously made employment decisions, which were the subject of the lawsuit. That is neither retaliation nor adverse employment action. As noted by the Fifth Circuit, if it were, every unequal pay claim would be transformed into a retaliation claim by an employer's predictable refusal to grant the disputed pay raise during the pendency of the suit. (Petition Appendix at 5a). That is an absurd result which is not contemplated by the retaliation law, and that occurrence does not create the requisite causal connection. That is so no matter which circuit's test or definition of employment action is applied. In short, under any test employed by any circuit, the Petitioners' retaliation claims fail. Accordingly, Petitioners' argument in this regard is without merit.

A third reason this is not a case requiring resolution of a conflict among circuits is that, in reaching its decision, the Fifth Circuit did not even rely upon the allegedly conflicting language. That is, nowhere in the panel decision does the phrase "ultimate employment decision" even appear and nowhere does the panel discuss this issue or the other circuits' holdings in this regard. Therefore, it was not a dispositive issue.

Moreover, despite Petitioners' bald assertion that the alleged retaliation in this case was "severe," both the district court and the Fifth Circuit rejected this characterization by Petitioners. Far from being "severe," the alleged conduct in the case was simply not actionable under any cause of action. As the district court found with regard to the allegation by Petitioners that the conduct of Respondents was "extreme" and "outrageous":

> CMH Parks contends, inter alia, that no conduct toward any of the plaintiffs rises to the requisite extreme and outrageous level necessary to sustain this cause of action. The Court agrees. In response to CMH Park's summary judgment, Plaintiffs allege scant instances of any specific conduct. What conduct is alleged is done so in conclusory fashion with few, if any, record citations to summary judgment evidence. Conclusory allegations are not summary judgment evidence.

(Petition Appendix at 12a). Therefore, the summary judgment evidence in this case does not show such "extreme" and "outrageous" conduct by Respondents to justify any exception under federal law.

Accordingly, to the extent the Fifth Circuit may be in conflict with other circuits on the issue of whether an "ultimate employment decision" is required, such conflict is not present in this case. Therefore, that issue does not present a basis for review and cannot be relied upon to contend that this case is of such importance that it warrants a review and decision on the merits by this Court.

III. No fact question exists on the summary judgment record in this case

Petitioners also assert that this Court should take this case because the summary judgment evidence shows that a fact question exists as to whether men were paid more for doing the same job as women. Because, according to Petitioners, this was established in the record, the grant of summary judgment caused them to be unfairly "stripped of being able to submit their case to the jury." (Petition at 9). What this argument completely ignores is, as discussed above, that the summary judgment evidence fails to show that the men cited by Petitioners had the same jobs or were similarly situated to Petitioners. Thus, Petitioners failed to establish their *prima facie* case. The district court provided, "Plaintiffs have failed to present evidence that the work they performed required equal skill, effort, and responsibility as the work performed by the complained of male employees." (Petition Appendix at 28a). Additionally, the Fifth Circuit panel stated, "After reviewing the record, we are persuaded that the unequal pay was the result of differences in job responsibilities, experience, and work performance." (Petition Appendix at 4a). These findings by the courts below accurately reflect the state of the summary judgment record. Accordingly, the summary judgment evidence simply does not support the Petitioners' argument and does not present any significant or important federal issue for the Court's consideration.

In summary, the unpublished opinion from the Fifth Circuit panel does not warrant review by this Court because this case involves nothing more than Petitioners' failure to meet its *prima facie* case based on the specific summary judgment record below. At this stage, Petitioners are merely rehashing the same conclusory and unsupported

contentions that have already been rejected by the district court and the Fifth Circuit.

IV. The Fifth Circuit's judgment and analysis is correct on the merits

In addition to the reasons stated above for the Court to deny the writ sought in this case, this Court should deny the writ because the Fifth Circuit panel correctly decided the issues on the merits. Therefore, even if this Court believed the issues were such as to warrant review by this Court, the only result would be to affirm the judgment.

A. Petitioners' claims are barred by limitations

First, the Petitioners' claims are barred under the applicable limitations periods. To establish an unequal pay claim under Title VII, a claimant must file a charge with the EEOC within 300 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1). While an exception applies for continuing violations, this exception is not applicable in Title VII cases based on discriminatory pay because a decision denying a pay raise is a discrete act with a degree of permanence sufficient to put an employee on notice of the adverse action and to trigger in an employee an awareness of the duty to assert his rights. *Celestine v. Petroleos de Venezuella S.A.*, 266 F.3d 343, 352 (5th Cir. 2001). With regard to an Equal Pay Act claim, the limitations period is two years preceding the date suit is filed. That period may be extended to three years if the claimant can prove the violation was willful. 29 U.S.C. § 255(a). Petitioners have not challenged these limitations

periods as applied by the courts below. Based on these established periods, the courts below properly determined that the Petitioners "failed to put forth any evidence of when they learned of the pay disparity." (Petition Appendix at 3a-4a). Indeed, Petitioners do not even challenge such finding and cannot point to any summary judgment evidence to support a timely filing. Accordingly, because there is no evidence to support a showing that Petitioners learned of the pay disparity within the limitations periods, the judgment below is correct and requires no review by this Court.

B. Petitioners failed to establish their *prima facie* case

Second, as discussed above, even if Petitioners can point to some summary judgment evidence showing that they learned of the pay disparity within the limitations period, Petitioners failed to establish their *prima facie* case. To establish a *prima facie* case of compensation discrimination under Title VII, a plaintiff must show that she is a member of a protected class, and is paid less than a nonmember for work requiring substantially the same responsibility. *Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425, 1431 (5th Cir. 1984). A *prima facie* Equal Pay Act claim requires a showing that the "employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which require equal skill, effort and responsibility, and which are performed under similar working conditions.'" 29 U.S.C. § 206(d)(1); *Corning Glass Works v. Brennan*, 417 U.S. 188, 195, 94 S. Ct. 2223, 41 L.Ed.2d 1 (1974); *Siler-Khodr v. Univ. of Texas Health Sci. Ctr. San Antonio*, 261 F.3d 542, 546 (5th Cir. 2001).

As both the district court and the Fifth Circuit found, while Petitioners list a number of male employees who were purportedly paid more, Petitioners failed to present evidence that the work they performed required equal skill, effort, and responsibility as the work performed by the men. In fact, in many instances, the record made clear that the men in question were not proper comparators because they held different positions, worked at different locations, worked during different time periods, and/or worked under different managers. Furthermore, Petitioners offered no evidence that the job content and actual job requirements were the same or that they had similar experience or training as the men they were citing. *Cf. EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188, 1196 (5th Cir. 1984); *see also Ceasar v. Lamar Univ.*, 147 F. Supp. 2d 547, 553 (E.D. Tex. 2001) (employees with different levels of experience are not "similarly situated" for purposes of Title VII salary comparison); *Lenihan v. Boeing*, 994 F. Supp. 776, 798 (S.D. Tex. 1998) (an individual's experience and training are factors upon which an employer may properly rely in justifying a pay differential). To the contrary, all that Petitioners offered were unsupported, subjective and conclusory statements that they were performing work commensurate to that of the male employees. This is simply not sufficient under federal law to defeat summary judgment, and the holdings of the lower courts recognized this. Accordingly, the decision of the Fifth Circuit is correct.

C. Respondents established legitimate, non-discriminatory reasons

Even if Petitioners had established their *prima facie* case, Respondents established legitimate, non-discriminatory

reasons for the pay differentials. The summary judgment evidence established that there were very substantial differences in the responsibilities, duties and experience of the male comparators. Without addressing the details of the summary judgment evidence, at this stage of this case, it is sufficient to note that both the district court and the Fifth Circuit panel reviewed the evidence and confirmed that it established legitimate, non-discriminatory reasons for the pay differentials. As the Fifth Circuit stated, "After reviewing the record, we are persuaded that the unequal pay was the result of differences in job responsibilities, experience, and work performance." (Petition Appendix at 4a). Accordingly, Respondents established legitimate, non-discriminatory reasons for the pay disparity.

D. Petitioners failed to show pretext

Moreover, the last layer of support for the summary judgment is that Petitioners failed to put forth any evidence that the reasons articulated by Respondents are pretextual. For the same reasons articulated above regarding Petitioners' failure to establish their *prima facie* case, Petitioners likewise failed to put forth any persuasive evidence that the reasons articulated by Respondents were pretexts for intentional discrimination. (Petition Appendix at 4a).

CONCLUSION

Petitioners have failed to provide any compelling reason for this Court to grant a Writ of Certiorari. The Fifth Circuit, in an unpublished opinion, did not decide any significant or unresolved issue of federal law. Moreover, the

decision below does not conflict with another circuit. Additionally, the district court and Fifth Circuit were correct in their decisions. This case does not merit further review by this Court.

For all the foregoing reasons, Respondents request that the Petition be denied.

Respectfully submitted,

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